87-412 (1)

Supreme Court, U.S.
F I L E D
SEP 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT
OF
THE UNITED STATES
OCTOBER TERM, 1987

PATRICK VILARDO AND ROBERT OVERBECK
PETITIONERS

V.

UNITED STATES OF AMERICA
RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether there is a means of preserving and taking an appeal from a United States District Court's ruling denying a motion to dismiss an indictment returned in violaton of Federal Rule of Criminal Procedure 6(d).

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PATRICK VILARDO AND ROBERT OVERBECK
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UNITED STATES OF AMERICA
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Patrick Vilardo and Robert Overbeck, the Petitioners herein, pray that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on June 12, 1987.

ORDERS ENTERED BELOW

The Court of Appeals did not render an opinion in this case. On June 12, 1987, the United States Court of Appeals for the Sixth Circuit entered the order refusing Petitioners' request for permission to appeal an order denying their motion to dismiss the indictment returned against them, which is printed in Appendix A hereto, infra, page 11.

JURISDICTION

The Order of the United States Court of Appeals for the Sixth Circuit (Appendix A, infra, page 11) was entered on June 12, 1987 (the time of entry is unknown).

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

KENTUCKY CONSTITUTIONAL PROVISIONS AND RULES OF COURT INVOLVED

This case involves Section 237 of the Constitution of Kentucky and Federal Rules of

Criminal Procedure 6(d), 12(b)(2), and 12(f), which provide as follows:

CONSTITUTION OF KENTUCKY

§237. Federal office incompatible with state office.-No member of Congress, or person holding or exercising an office of trust or profit under the United States, or any of them, or under any foreign power, shall be eligible to hold or exercise any office of trust or profit under this Constitution, or the laws made in pursuance thereof.

FEDERAL RULES OF CRIMINAL PROCEDURE

RULE 6. The Grand Jury

(d) Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

RULE 12. Pleadings and Motions Before Trial; Defenses and Objections.

(b) Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

(1) Defenses and objections based on defects in the institution of the prosecution; or

(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be

noticed by the court at any time during the pendency of the proceedings); or

(3) Motions to suppress evidence; or

(4) Requests for discovery under Rule 16; or

(5) Requests for a severance of charges or defendants under Rule 14.

(f) Effect of Failure To Raise Defenses or Objections. Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

STATEMENT OF THE CASE

On November 26, 1986, Indictment No. 86-42 was returned at the United States District Court, Eastern District of Kentucky, Covington, against the Petitioners, Patrick Vilardo and Robert Overbeck. Discovery revealed that a state Commonwealth Attorney was by special appointment made an assistant United States Attorney and appeared in that capacity before the federal grand jury that issued the indictment against the Petitioners herein.

Section 237 of the Kentucky Constitution and Kentucky case law prohibits a person from

simultaneously holding an office of trust for the Commonwealth of Kentucky and the United States. Under the laws of Kentucky, then, the appointment of the Commonwealth's Attorney as a special assistant United States Attorney was invalid, and he was an unauthorized person before the grand jury under Federal Rule of Criminal Procedure 6(d).

On March 13, 1987 Petitioners moved to dismiss the indictment for the reasons set forth above. The motion was denied by Order of the United States District Court, Eastern District of Kentucky, Covington, entered April 24, 1987. By Order entered May 4,1987, the United States District Court certified its Order of April 24, 1987 for immediate appeal pursuant to 28 U.S.C. §1292(b).

Invoking the jurisdiction of the Court of Appeals for the Sixth Circuit under 28 U.S.C. §1292(b), Petitioners subsequently requested that the Court of Appeals grant permission to appeal the District Court's interlocutory order.

Permission to appeal the order was denied by Order of the United States Court of Appeals for the Sixth Circuit entered June 12, 1987.

REASONS FOR GRANTING THE WRIT

In the absence of a provision for an interlocutory appeal from an Order denying a motion to dismiss a tainted indictment, this Court's decision in United States v. Mechanik, 106 S.Ct. 938 (1986) has effectively denied defendants the right to appellate review of that decision.

Federal Rules of Criminal Procedure 12(b)(2) and 12(f) require that objections regarding defects in an indictment, such as a Rule 6 motion, must be raised prior to trial or they are waived. However, the rules provide no means for an immediate appeal from an order denying such a motion. And, should the trial court defer its ruling on a Rule 6 motion until after the verdict, post-judgment review is unavailable in light of this Court's holding in United States v. Mechanik, supra, that any irregularities or misconduct in

conducting the grand jury proceedings are rendered moot after conviction. Thus, a defendant has no right to appellate review of such violations if a conviction results from an illegally obtained indictment.

Certainly, there is no right to relief for such a violation if the defendant is acquitted; though the petit jury may have in fact determined that even probable cause did not exist, in which instance the defendant has been most severely damaged as he has been forced to trial in the absence of a preliminary finding of probable cause.

The Mechanik decision has rendered Rule 6 unenforceable as predicted by Justice O'Connor in her concurring opinion.

"...I write separately because I believe that the analysis adopted by the Court for detrmining the effect of a violation of the rules governing the conduct of grand juries effectively renders those rules a dead letter, thereby seriously undermining the grand jury's traditional function of

protecting the innocent from unwarranted public accusation." United States v. Mechanik, supra, at 943.

It is therefore imperative that this Court either promulgate a rule allowing interlocutory appellate relief, or by decision, reach the same result.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

ORDER OF
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
OF JUNE 12, 1987

ORDER OF
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON
OF MAY 4, 1987

ORDER OF
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON
OF APRIL 24, 1987

87-8514
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
JUN 12 1987
JOHN P. HEHMAN, Clerk
Eastern District of Kentucky
FILED
JUN 15 1987
AT COVINGTON
LESLIE G. WHITMER
CLERK, U. S. DISTRICT COURT

United States of America,)
)
Plaintiff-Appellee,)
)
vs.) ORDER
)
Patrick Vilardo and)
Robert Overbeck,)
)
Defendants-Appellants.)

Before: WELLFORD, MILBURN and NELSON; Circuit Judges.

The defendants petition the Court for permission to appeal from an order denying their motion to dismiss the indictment entered against them. The government has not filed a response.

The defendants were indicted on November 26, 1986, and charged with arson, mail fraud and wire fraud. By order dated April 24, 1987, the district court denied the defendants' motion to dismiss the indictment. The trial judge subsequently certified that order for immediate appeal pursuant to 28 U.S.C. §1292(b).

It is well established in this circuit that 28 U.S.C. §1292(b) provides for interlocutory appeal in civil cases only. In re April 1977 Grand Jury Subpoenas, 584 F.2d 1366 (6th Cir. 1978)(en banc), cert. denied, 440 U.S. 934 (1979).

Because the defendants attempt to appeal from a non-final decision in a criminal action,

It is **ORDERED** that the petition for permission to appeal is denied.

ENTERED BY ORDER OF THE COURT

A TRUE COPY
Attest:
JOHN P. HEHMAN, Clerk
By _____
Deputy Clerk

John P. Hehman, Clerk

Eastern District of Kentucky
FILED
MAY 4 1987
AT COVINGTON
LESLIE G. WHITMER
CLERK, U. S. DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

CRIMINAL ACTION NO. 86-42

UNITED STATES OF AMERICA PLAINTIFF

vs.

PATRICK VILARDO DEFENDANTS

and

ROBERT OVERBECK

PROPOSED
ORDER

This matter is before the Court on the Petition of the Defendants, Patrick Vilardo and Robert Overbeck, for permission to appeal this Court's Order overruling the Defendants' Motion to Dismiss Indictment No. 86-42 entered April 24, 1987 for violation of Federal Rule of Criminal Procedure 6(d).

The Court having reviewed the Petition filed jointly by the Defendants, finds that a controlling question of law is involved with respect to which there is substantial ground for difference of opinion, and that an immediate

appeal from the Order may materially advance the ultimate termination of litigation. Further, in light of the recent decision of United States vs. Mechanik, ___U.S.___, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986) it is the opinion of this Court that denial of an immediate appeal appeal would leave the Defendants without the means to perserve the issue for appeal; now, therefore,

IT IS HEREBY ORDERED that the Court's previous Order of April 24, 1987 be and hereby is certified for immediate Appeal pursuant to 28 USCS §1292(b).

This 1st day of May, 1987.

William O. Bertlesman

WILLAIM O. BERTLESMAN, JUDGE

cc: Harry P. Hellings, Jr.
Edward G. Drennen, II
W. Robert Lotz

Eastern District of Kentucky
FILED
APR 24 1987
AT COVINGTON
LESLIE G. WHITMER
CLERK, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

CRIMINAL ACTION NO. 86-42

UNITED STATES OF AMERICA PLAINTIFF

VS. ORDER

PATRICK VILARDO, ET AL DEFENDANTS

This matter is before the court on the motion of defendant Thornberry to dismiss the indictment herein, filed on March 13, 1987, and the other two defendants, Villardo and Overbeck, having joined in such motion, and the United States having filed its response thereto, and the court being sufficiently advised,

IT IS ORDERED that said motion to dismiss be, and it is, hereby DENIED.

This 24th day of April, 1987.

William O. Bertelsman

WILLIAM O. BERTELSMAN, JUDGE

(2)

No. 87-412

Supreme Court, U.S.
FILED
OCT 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

PATRICK VILARDO AND ROBERT OVERBECK, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
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6 pp

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18 U.S.C. 1341 1
18 U S.C. 1343 1
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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-412

PATRICK VILARDO AND ROBERT OVERBECK, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners assert (Pet. 8-10) that they have been deprived of a right to review of their contention that a pending indictment was tainted by an irregularity in the grand jury proceeding.[1]

1. On November 26, 1986, petitioners were indicted by a grand jury sitting in the Eastern District of Kentucky. They were charged with conspiracy to damage property by arson and to commit mail and wire fraud, in violation of 18 U.S.C. 371 (Count One); arson of property used in interstate commerce, in violation of 18 U.S.C. 844(i) (Count Two); and various counts of mail fraud, in violation of 18 U.S.C. 1341 (Counts Three through Six), and wire fraud, in violation of 18 U.S.C. 1343 (Counts Seven through Nine).[2] The indictment followed a joint state and federal

[1] The order of the court of appeals denying leave to appeal (Pet. App. 1-2) was entered on June 12, 1987. The petition was filed on September 10, 1987, and is therefore out of time under Rule 20.1 of the Rules of this Court.

[2] Trial on these charges is pending and has been stayed until the Court acts on this petition.

investigation of the deliberate burning of a nightclub in Covington, Kentucky.

Co-defendant Harold Thornberry, who was charged in three counts, moved to dismiss the indictment on the ground that the Commonwealth Attorney for Kenton County, Kentucky, was improperly designated as a "Special Assistant United States Attorney" in the joint investigation and was not legally authorized to appear before the federal grand jury. Petitioners joined in the motion, which the district court denied.

Following the denial of the motion to dismiss, the district court certified the question for appeal to the court of appeals under 28 U.S.C. 1292(b), finding "that a controlling question of law is involved with respect to which there is substantial ground for difference of opinion, and that an immediate appeal from the Order may materially advance the ultimate termination of litigation" (Pet. App. 3-4). The district court also stated that in light of this Court's decision in *United States* v. *Mechanik*, 475 U.S. 66 (1986), denial of an immediate appeal would leave petitioners without the means to preserve the issue for appeal at a later stage in the case (Pet. App. 4).

Petitioners accordingly sought leave from the court of appeals to take an interlocutory appeal from the district court's order. The court of appeals denied the petition to appeal (Pet. App. 1-2). The court stated that "[i]t is well established in this circuit that 28 U.S.C. §1292(b) provides for interlocutory appeal in civil cases only" (Pet. App. 2). Because the claim in the instant case arose in a criminal case, the court refused to permit an appeal under Section 1292(b).

2. Petitioners contend that if they are not given the right to interlocutory review of their grand jury challenges, they effectively will lose the right to have their claims reviewed at all. That is so, they suggest, because *United States* v. *Mechanik, supra*, makes it clear that such

claims do not survive a subsequent conviction by the petit jury. Petitioners, however, chose as their statutory basis for review a provision that is strictly limited to civil cases. Thus, even assuming the validity of their claim that *Mechanik* requires that defendants be given the right to pretrial appeals when they raise grand jury claims, the decision below forecloses only such appeals based on 28 U.S.C. 1292(b); it does not foreclose appeals resting on other jurisdictional bases.

No court permits review under Section 1292(b) of an interlocutory order in a criminal case. By its terms, Section 1292(b) is limited to civil cases. The courts have therefore uniformly disallowed interlocutory criminal appeals under that provision. See *United States* v. *White*, 743 F.2d 488, 493 (7th Cir. 1984); *In re Grand Jury Empanelled Aug. 14, 1979*, 638 F.2d 1235, 1238 n.2 (3d Cir. 1981); *In re April 1977 Grand Jury Subpoenas*, 584 F.2d 1366 (6th Cir. 1978) (en banc), cert. denied, 440 U.S. 934 (1979); *United States* v. *Selby*, 476 F.2d 965, 967 (2d Cir. 1973); *United States* v. *Doucet*, 461 F.2d 1095, 1096 (5th Cir. 1972); see also 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure: Jurisdiction* § 3929, at 146 (1977).

To be sure, there is currently a division among the circuits on the question whether challenges to the indictment for grand jury irregularity are reviewable as final judgments, pursuant to 28 U.S.C. 1291, under the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Compare *United States* v. *The LaRouche Campaign*, No. 87-1731 (1st Cir. Sept. 17, 1987) (no interlocutory review of grand jury challenges), with *United States* v. *Benjamin*, 812 F.2d 548 (9th Cir. 1987), and *United States* v. *Dederich*, 825 F.2d 1317 (9th Cir. 1987) (granting right of interlocutory review under collateral order doctrine). See also *United States* v. *Taylor*, 798 F.2d 1337 (10th Cir. 1986) (no interlocutory

appeal because review of the challenges to the indictment at issue in that case held not to be foreclosed by *Mechanik*). That conflict is not presented in this case, however, because petitioners failed to invoke Section 1291 and the collateral order doctrine as a basis for appellate jurisdiction, and the court of appeals therefore had no occasion to address that issue. Because Section 1292(b) was the only jurisdictional basis that petitioners invoked below, and because there is no conflict among the circuits with respect to the holding that Section 1292(b) does not apply to criminal cases, review by this Court is clearly unwarranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

OCTOBER 1987

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